No. 18A629
No. 18-281

IN THE SUPREME COURT OF THE UNITED STATES

VIRGINIA HOUSE OF DELEGATES, M. KIRKLAND COX,

Applicants,

v.

GOLDEN BETHUNE-HILL, et al.,

Respondents.

Appeal from the United States District Court for the Eastern District of Virginia

RESPONDENTS' OPPOSITION TO EMERGENCY APPLICATION FOR STAY PENDING RESOLUTION OF DIRECT APPEAL TO THIS COURT

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I. INTRODUCTION

That the Court is confronted in Winter 2018 with a stay application related to Virginia's 2011 House of Delegates ("House") districting plan is telling: Plaintiffs-Respondents ("Respondents") have waited a very long time for relief from the Commonwealth of Virginia's ongoing violation of their constitutional rights. That the Court is confronted with an "emergency" stay application from a district court opinion entered in June 2018—six months ago—is equally telling: There is no emergency here. Indeed, Applicants waited three months after the district court denied their motion for stay to file their Emergency Application for Stay Pending Resolution of Direct Appeal to This Court ("Mot.").[1] Unsurprisingly, Applicants fail to carry their burden of demonstrating their entitlement to the extraordinary relief they belatedly seek.

This Court has made quite clear that "once a State's . . . apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). This is not an unusual case, and the district court is doing nothing more than carrying out this Court's mandate to take appropriate action to adopt a remedial districting plan.

Indeed, it is likely that this Court will not even reach the merits of the case on direct appeal, let alone reverse and rule for Applicants. Defendants (the State

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[1] Applicants are the Virginia House of Delegates and the Speaker of the House, in his official capacity.

Board of Elections and its representatives) defended this case through two trials in the district court below and one previous appeal to this Court. At long last, recognizing the deferential "clear error" standard of review to which the factual findings that underlie the district court's memorandum opinion are subject, *see Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*), the State Defendants admitted defeat and chose not to appeal. Undeterred, Applicants press on alone. But as explained below, they do not have standing to pursue this appeal.

In any event, as the three-judge panel below properly found in rejecting Applicants' stay motion back in August, Applicants cannot meet their heavy burden of demonstrating that the extraordinary relief of a stay is warranted. As the district court repeatedly emphasized, its resolution of Applicants' claims in the eleven Challenged Districts was a fact-intensive exercise that turned heavily on credibility determinations, all of which are subject to clear error review. The district court's conclusions that race predominated and that the use of race was not narrowly tailored are amply supported by the evidence. Applicants thus have little likelihood of success on the merits.

The other stay factors also cut against Applicants. It is an absolute certainty, and a fundamental tenet of the Court's voting rights jurisprudence, that Respondents and the other residents of the Challenged Districts will suffer irreparable injury if they are forced to continue to reside and cast ballots in unconstitutional districts. *See Reynolds*, 377 U.S. at 585; *Elrod v. Burns*, 427 U.S.

347, 373 (1976) (any illegal impediment on the right to vote is an irreparable injury). For this reason, the public interest also counsels against granting a stay.

By contrast, Applicants are unable to articulate any cognizable—let alone irreparable—injury to *them*, and are forced instead to argue that the Commonwealth will incur administrative burden in the absence of a stay. But the State Defendants themselves have urged the district court to implement a remedial plan immediately because doing so is far less disruptive to the Commonwealth's election processes.

The Court should deny Applicants' request for a stay.

II. BACKGROUND

This case involves a challenge to eleven House of Delegates districts. Respondents filed this lawsuit in 2014, after a three-judge panel of the Eastern District of Virginia held that Virginia's Third Congressional District was impermissibly drawn using a 55% black voting age population ("BVAP") "floor." Because the record in that case showed that the same 55% BVAP floor had been employed to draw majority-BVAP districts in the House plan, Respondents filed suit.

The first trial in this matter was held in June 2015. At the first trial, Applicants pushed the district court to accept a novel predominance analysis in which the court would close its eyes to the full gamut of direct and circumstantial evidence that this Court had identified for decades as relevant. *See Miller v. Johnson*, 515 U.S. 900, 916 (1995). Rather, Applicants urged the district court to "consider[] the legislature's racial motive only to the extent that" the plaintiffs could

identify specific "deviations from traditional redistricting criteria" and then prove that each such individual "deviation" was "attributable to race and not to some other factor." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). The district court thereafter adopted this test and found—utilizing it—that race predominated in District 75 but the district was narrowly tailored, and that race did not predominate in the remaining eleven Challenged Districts.

On appeal, this Court held that Applicants' legal position was erroneous, as it "foreclosed a holistic analysis of each district and led the District Court to give insufficient weight to the 55% BVAP target and other relevant evidence that race predominated." *Bethune-Hill*, 137 S. Ct. at 799. The Court therefore vacated and remanded for further proceedings, finding that "[t]he District Court is best positioned to determine in the first instance the extent to which, under the proper standard, race directed the shape of these 11 districts" and, if so, "whether strict scrutiny is satisfied." *Id.* at 800.

On remand, Applicants insisted that the district court reopen discovery and hold a new trial, arguing that the district court was "'best positioned to determine in the first instance both the questions of predominance and narrow tailoring,' in part because it can weigh testimony and assess credibility." ECF No. 146 at 9-10 n.4 (quoting *Bethune-Hill*, 137 S. Ct. at 800). It did so. Respondents presented analysis from two new expert witnesses and additional evidence from fact witnesses (both old and new) that pointed out significant inaccuracies and contradictions in the evidence presented by Applicants during the first trial. *See, e.g.*, J.S. App. 35-38.

On June 26, 2018, the district court issued a Memorandum Opinion holding that the remaining eleven Challenged Districts are unconstitutional racial gerrymanders. *See* J.S. App. 1-98. The district court enjoined the Commonwealth from holding further elections under the enacted plan. Rather than immediately implementing a remedy itself, the district court gave the Commonwealth until October 30, 2018—four months—to enact a new districting plan. *See* J.S. App. 203.

On July 6, 2018, Applicants filed a notice of appeal. ECF No. 236. The Attorney General of the Commonwealth, on behalf of the State Defendants, did not, concluding that they had little likelihood of success on appeal and that an appeal was thus not a wise use of taxpayer dollars. ECF No. 246 at 1-2.

The same day they filed their appeal, Applicants requested that the district court enter a stay pending appeal. ECF No. 237. Among other things, Applicants argued that the mere fact that the district court "require[d] the Virginia legislature to enact a remedial plan by October 30, 2018, for the November 5, 2019, House of Delegates Elections" would "result in irreparable harm to the [Applicants]." *Id.* at 7. Applicants' reply in support of their stay motion further argued that Applicants were presently suffering irreparable injury because even "[u]ndertaking" any "attempt to redistrict"—whether successful or not—would constitute "irreparable harm." ECF No. 249 at 12 n.5.

On August 30, 2018, the district court unanimously denied Applicants' motion to stay. *See* ECF No. 256. A majority of the panel held that Applicants had failed to establish a strong showing of a likelihood of success on the merits, given

that the district court had struck down the Challenged Districts for reasons set out at great length in its order, and that the factual findings in that order were subject to "clear error" review. *Id.* at 1-2. All three members of the panel found that a balancing of the equities strongly supported denial of the stay, given that next year's elections are the last regularly scheduled elections to be undertaken before the next decennial redistricting and thus "the risk that a stay wholly would deprive the plaintiffs of a remedy," would "significantly outweigh[] the inconvenience and any other detriments that the intervenors may experience in re-drawing the districts." *Id.* at 2; *see also id.* at 3 ("I fully agree with the irreparable injury analysis made by the majority, and, on balance, the injury to the plaintiffs if a stay is granted significantly outweighs the injury to the Defendant-Intervenors if the stay is denied.") (Payne, J., concurring). All three members further agreed that the public interest tipped in favoring of denying the stay motion. *Id.* at 2-3. For all these reasons, the district court denied Applicants' motion to stay.

Given their protestations of irreparable injury, one might have expected Applicants to move for relief before this Court promptly. But they did not. To the contrary, Applicants sat on their hands and took no further action. For months. They did not seek a stay in this Court. They did not move the district court for reconsideration.

Nor did they get to work on a remedial districting plan. Ultimately, the Governor was compelled to call the General Assembly into special session. The House did not pass a remedial plan (or even put one up for floor vote). After

Applicants informed the district court that the Commonwealth would not adopt a remedial plan itself before the October 30 deadline, ECF No. 275 at 5, the district court took up the task of enforcing its order by developing a process to adopt a remedial plan.

These remedial proceedings have been lengthy and involved, including the submission of proposed remedial plans by parties and nonparties alike, the appointment of a special master, and considerable work by the special master, supported by state employees, to consider the various proposals and draft to a 153-page report presenting remedial options for the district court's consideration. Applicants actively participated in the remedial process and proposed multiple proposed districting plans, which they urged the district court to adopt. *See* ECF No. 291.[2]

Then, on November 28, a full three months after the district court had denied their motion for stay, Applicants abruptly filed a "renewed" stay motion before the district court. *See* ECF No. 311. The district court made short work of what amounted to an untimely motion for reconsideration of the district court's August 30, 2018, order, denying it on December 7, 2018, for the same reasons it had already explained three months prior. *See* ECF No. 322.

Despite their claims of emergency, Applicants then waited another week before filing the instant stay application. Finally, six months after the district court

[2] Just this week, during a conference call with the district court in preparation for a January 10 hearing on the proposed remedial plans, Applicants sought and obtained an additional round of briefing on the special master's proposals. *See* ECF No. 330.

issued its Memorandum Opinion and three months after the district court denied Applicants' first motion for stay, this "emergency" stay application comes before this Court for consideration.

III. ARGUMENT

Applicants cannot meet their heavy burden of demonstrating that the Court should—contrary to the will of the State Defendants—stay the district court's Memorandum Opinion pending appeal. Applicants cannot show that they are likely to prevail on the merits of their appeal. Even if they could, the application should be denied because the certain injury that Respondents and the public at large would suffer if the unconstitutional Challenged Districts are not promptly remedied far outweighs any administrative expense or other considerations necessitated by taking the steps required to hold elections in 2019 under a constitutional districting plan.

A. Applicants Face a Significant Burden to Establish Their Entitlement to the "Extraordinary Relief" They Seek

"A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926). It is instead "an exercise of judicial discretion." *Id.*

A stay pending appeal is "extraordinary relief," and the party requesting a stay bears a "heavy burden." *Winston-Salem/Forsyth Cty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, Circuit Justice); *see also Nken v. Holder*, 556 U.S. 418, 433-34 (2009) ("The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion."); *Williams v. Zbaraz*, 442

U.S. 1309, 1311 (1979) ("[T]he applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.") (quoting *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975)).

In determining whether to grant a stay pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors of the test outlined above "are the most critical." *Id.*

To establish a likelihood of success on the merits of an appeal to this Court, a party must show: (1) a "'reasonable probability' that four Justices will consider the issue sufficiently meritorious" to note probable jurisdiction *and* (2) that a majority of the Court will reverse on the merits. *See Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (citation omitted). The moving party must show that it is *likely* to prevail on the merits—more than speculation and the hope of success is required. *See Nken*, 556 U.S. at 434 (a party seeking a stay must show something more than "a mere 'possibility'" of success on the merits).[3] "By the same token, simply showing some

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[3] Notably, a party seeking a stay pending appeal "will have greater difficulty in demonstrating a likelihood of success on the merits" than one seeking a preliminary injunction because there is "a reduced probability of error" in a decision of the district court based on complete factual findings and legal research. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

'possibility of irreparable injury' . . . fails to satisfy the second factor." *Id.* at 434-35 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

Contrary to Applicants' suggestion that redistricting cases are subject to a stay pending appeal to the Court as a matter of course, Mot. at 11, there is no such rule. Indeed, both this Court and the district courts have frequently denied stay applications in similar redistricting cases. *See, e.g., Wittman v. Personhuballah*, 136 S. Ct. 998 (2016) (order denying motion to stay order during pendency of Supreme Court review); *see also McCrory v. Harris*, 136 S. Ct. 1001 (2016) (same); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336-37 (N.D. Ga. 2004) (same, and collecting cases).[4]

Wittman, dealing with a congressional district drawn by the same General Assembly at issue here, is highly instructive. There, as here, the losing party (the intervenors) moved the district court to stay its decision. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 557 (E.D. Va. 2016). The district court denied the stay motion, noting that "[t]here is no authority to suggest that this type of relief [a stay] is any less extraordinary or the burden any less exacting in the redistricting context." *Id.* at 558-59 (citation omitted). Thereafter, intervenors made a direct application for stay to Circuit Justice Roberts, who then referred the application to the full Court. At the time, the Court had already set the case for argument, and

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[4] *See also Giles v. Ashcroft*, 193 F. Supp. 2d 258, 261 (D.D.C. 2002) (noting, with respect to related litigation, that a party had "sought to stay the federal court's ruling [ordering adoption of a redistricting plan] until the United States Supreme Court could hear an appeal, but that request was denied on March 1, 2002, and the appeal remains pending before the Supreme Court at this time"); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542-43 (N.D. Fla. 1996) (denying a stay pending appeal of an order striking down Florida's Third Congressional District).

application was made in an election year (2016). Nonetheless, the Court denied the application. *Wittman*, 136 S. Ct. 998.

A similar sequence played out in North Carolina that same year. After a three-judge panel struck down two North Carolina congressional districts as racial gerrymanders, defendants moved for an emergency stay. The district court denied the motion, concluding that all relevant factors weighed against issuance of a stay. *See Harris v. McCrory*, No. 1:13CV949, 2016 WL 6920368, at *1-2 (M.D.N.C. Feb. 9, 2016). Thereafter, this Court denied the defendants' direct application for a stay. *McCrory*, 136 S. Ct. 1001. It then noted probable jurisdiction and set the case for argument, *McCrory v. Harris*, 136 S. Ct. 2512 (2016), thus creating the possibility that the state might hold an election under an "unnecessary" remedial plan. Still, the state adopted a new map, which was used in the 2016 election while the case remained pending on appeal.

To be sure, as in any other kind of cases, there are instances where the Court has granted a stay pending appeal in redistricting litigation. Applicants cite some. Mot. at 12. But the mere fact that the Court has on other occasions, as to other specific jurisdictions, on other factual records, without explanation, stayed implementation of remedial redistricting plans is of no moment here. The opinion at issue here was issued in June 2018—roughly 17 months before the next general election in November 2019. The cases Intervenors cite involve decisions issued closer to the next election, or involved novel questions such as the justiciability of partisan gerrymandering claims (i.e., *Gill v. Whitford*, 137 S. Ct. 2289 (2017)).

Applicants do not present a single case where a court has granted a stay on remotely comparable facts; i.e., where an intervenor (whose standing to pursue an appeal is questionable) asks the Court to stay implementation of a remedy for a racial gerrymander leading up to the last regularly scheduled election before the next decennial redistricting over the objections of the State whose redistricting plan is at issue.

B. Applicants Do Not Have Standing on Appeal

At the outset, Applicants cannot show they are *likely* to succeed on the merits of their appeal when the Court need not even *reach* the merits to dispose of it.

The Court has ordered full briefing in this case but has not noted probable jurisdiction. To the contrary, the Court "postponed" the question of jurisdiction and specifically instructed the parties to brief and argue "[w]hether appellants have standing to bring this appeal." ECF No. 313. Applicants elide the distinction between noting and postponing jurisdiction, arguing that "[i]f the Court had already concluded that Applicants lacked standing to appeal . . . it would not have asked for briefing" on the merits as well. Mot. at 13. Not so. Indeed, in *Wittman*, which concerned a challenge to Virginia's congressional districting plan drawn by the same General Assembly at issue here, the Court issued an order postponing jurisdiction and ordering the parties to brief both the merits and whether the appellants-intervenors "lack[ed] standing" given that that the State Defendants (the same institutional defendants here) had not appealed. *Wittman v. Personhuballah*, 136 S. Ct. 499 (2015). The Court thereafter held that the appellants-intervenors did,

indeed, lack standing. *See generally Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016).

Applicants do not, in fact, have standing. Much of Applicants' argument on this point is devoted to arguing that they simply must have standing because they were permitted to *intervene* in proceedings before the district court below. *See* Mot. at 13-14. The fact that a party may have a sufficient *interest* to intervene under Federal Rule of Civil Procedure 24 in a district court does not mean it has independent standing under Article III to seek review from this Court. With the State Defendants' decision not to appeal, this case has "lost the essential elements of a justiciable controversy." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48 (1997). Applicants can no longer "piggyback" on the State Defendants to sustain their participation in this case. *Diamond v. Charles*, 476 U.S. 54, 64 (1986). They must now *independently* establish standing. *See id.* at 68 ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III."); *see also Wittman*, 136 S. Ct. at 1736-37 (intervenors lacked standing after Commonwealth of Virginia chose not to appeal adverse decision in congressional redistricting case).

Applicants cannot satisfy their burden to establish standing here. Specifically, Appellants fail to identify any cognizable injury resulting from the district court's ruling. At an "irreducible constitutional minimum," Article III requires (1) an injury in fact that is (2) fairly traceable to the challenged conduct

and (3) likely to be redressed through a favorable judicial decision. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). This is so even on appeal. *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). An injury sufficient to confer standing must be "concrete and particularized." *Spokeo*, 136 S. Ct. at 1548. Applicants do not have a constitutionally sufficient injury here.

The fact that Applicants have not suffered a cognizable injury is powerfully illustrated by their inconsistent attempts to explicate that supposed injury. When they first moved for a stay before the district court (in July), Applicants complained that the House was injured by being "compelled to draw a remedial plan by October 30" (ECF No. 237 at 9), i.e., that Applicants were injured because the district court was somehow "forcing" the House of Delegates to draw a remedial plan by acting with comity and giving it the *opportunity* to do so in the first instance. *See* J.S. App. 97 ("We . . . allow the Virginia General Assembly until October 30, 2018 to construct a remedial districting plan that rectifies the constitutional deficiencies identified in this opinion.").

In Applicants' current telling, their injury is 180 degrees different. Now, Applicants complain that they are injured because, after the House failed to act, the district court "reassign[ed] the legislature's mapmaking authority" to a court-appointed special master who is aiding the district court in preparing a remedial plan. Mot. at 14. In other words, Applicants now claim to be injured because the district court is *not* forcing the House to continue to attempt to draw a new plan. This newfound "injury" is no more compelling.

For starters, the House's complaint that the district court struck down a "duly enacted" piece of legislation as unconstitutional (Mot. at 14) does not confer standing on a single house of a legislative body to file an appeal. This Court has held that legislative intervenors *do* have standing when they represent the State's interests and they have authority under State law to pursue litigation on the State's behalf. *See Karcher v. May*, 484 U.S. 72, 82 (1987). That is not the case here. Instead, Applicants represent the parochial interests of one chamber of one branch of Virginia's government. Of course, those interests are not the same as the interests of the *Commonwealth*, which is made clear by the State Defendants' decision not to appeal.

Moreover, as explained by the State Defendants' in their Motion to Dismiss, *see* State Appellees' Motion to Dismiss, *Va. House of Delegates v. Bethune-Hill* (U.S. Oct. 9, 2018) (No. 18-281), Intervenors have no authority under Virginia law to take this appeal. As a matter of statute, the Commonwealth is represented by the Attorney General, who is bestowed authority to provide "[a]ll legal service in civil matters for the Commonwealth . . . and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge, including the conduct of all civil litigation in which any of them are interested." Va. Code Ann. § 2.2-507(A) ("Administration of Government"); *cf. Hollingsworth*, 570 U.S. at 710 (a state designates who may represent it in federal court). There is no question that this case involves a "civil matter" that implicates the House and its Speaker. *See* Va. Code Ann. § 2.2-507(A). For that reason, the Commonwealth,

through its Attorney General, has the "legitimate" claim to litigating the "enforceability of its own statutes." *Maine v. Taylor*, 477 U.S. 131, 137 (1986) (citing *Diamond*, 476 U.S. at 65).

Thus, Applicants do not have authority to act on the Commonwealth's behalf. Nor can they point to anything that would grant them standing in their own right. Applicants claim the district court stripped the House of "mapmaking authority." Hardly. The district court struck down a single piece of legislation as unconstitutional, and then took steps to implement its order only after Applicants told it that the political branches would not enact remedial legislation themselves. ECF No. 275 at 5. Applicants do not cite any case where a court has found a legislature had standing in similar circumstances.[5]

Finally, Applicants claim they are injured because they will be "forc[ed] to prepare for next November's elections under a remedial plan." Mot. at 14. This vague statement leaves the Court to wonder what this "preparation" injury could

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[5] The cases Applicants rely on are all inapposite, as they involved fundamental changes to the composition of the legislative body or its areas of responsibility and authority. *See Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 194 (1972) (the Minnesota Senate was "directly affected by the District Court's orders" changing the legislature's composition by reducing the size of the Senate); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2663-64 (2015) (the Arizona Legislature was "an institutional plaintiff asserting an institutional injury" to its legislative power, where it challenged a ballot initiative that would have transferred mapdrawing authority from the legislature to an independent commission); *Coleman v. Miller*, 307 U.S. 433, 446 (1939) (twenty state legislators had standing to challenge their state's ratification of a federal constitutional amendment on the theory that the Kansas Lieutenant Governor had improperly cast a deciding vote in favor of ratification and thereby vitiated the legislators' votes, which would otherwise have defeated ratification). Neither kind of fundamental change is at issue here.

be. A "party invoking the court's jurisdiction cannot simply allege a nonobvious harm, without more." *Wittman*, 136 S. Ct. at 1737.

There is no "more" here. To the extent Applicants' "preparation" injury relates to election administration, it is not theirs to claim. Rather, the State Defendants (the State Board of Elections and its members) are responsible for administering elections in Virginia, and they have *opposed* Applicants' attempt to stay implementation of a remedial plan. To the extent Applicants' "preparation" injury relates to routine election planning, it is far too generalized. Any number of people might "prepare" for an upcoming election in some fashion, such as challengers who are deciding whether to run, political consultants who are deciding which politicians to work with, and voters who are planning to vote in that election. Under Applicants' theory, all of these people would have standing to allege the same diffuse "preparation" injury.

Moreover, while some *individual* members of the House may be "forced to prepare" for an election under a remedial plan that they may not prefer as compared to the enacted plan, a change to any particular district's boundaries does not amount to an injury to the House *as an institution*. Whenever the lines of a districting plan change, some incumbents may be delighted with the result, and others not. The House as an institution cannot advance the interests of an individual favored legislator at the expense of another.

In any event, even assuming the House could somehow stand in the shoes of individual legislators, this Court has made clear that legislators cannot establish

standing by speculating a new districting plan will "injure" them. In *Wittman*, for example, the Court found that representatives lacked standing to challenge the redraw of their districts based on their professed concerns that under the court-adopted remedial plan "a portion of the[ir] 'base electorate'" will necessarily be replaced with 'unfavorable Democratic voters,' thereby reducing the likelihood of the Representatives' reelection." *Wittman*, 136 S. Ct. at 1737. The Court held that even assuming this was a cognizable injury, the intervenors had "not identified record evidence establishing their alleged harm." *Id.*

Applicants' claim here is even less supported. To be sure, Applicants have offered no "record evidence establishing" any alleged harm to the electoral prospects of any individual legislator whose interests they purport to represent. *Id.* They have not because they could not—the district court has not even adopted a remedial plan yet. Regardless, Applicants have assured the Court that however the Court rules, Virginia will have ample time to implement a responsive map for the 2019 elections thereafter. Mot. at 3.

In short, whatever "injury" Applicants suggest will be suffered if some undefined person "prepares" for an election in some undefined way is inchoate at best, and not the kind of cognizable injury that bestows standing.

C. Applicants Cannot Establish a Likelihood of Success on the Merits

A districting plan fails constitutional muster if it uses race as the predominant factor in determining whether to place a significant number of voters within or without a district unless the use of race is narrowly tailored to a compelling government interest. *Bethune-Hill*, 137 S. Ct. at 797, 800.

Here, as further discussed below, Applicants waited so long to file the instant stay application that Respondents have already filed a motion to dismiss or affirm. Respondents lay out in that motion, in considerable detail, why Applicants cannot establish a strong likelihood of success on the merits. Respondents will not repeat that discussion in full here, but instead make a few additional points.

The district court's opinion represents a straightforward application of the Court's recent decisions. The district court applied the correct legal standard as clarified by the Court on Respondents' prior appeal and applied in its other recent racial gerrymandering cases. The district court conducted a holistic—and indeed exhaustive—factual analysis of the Challenged Districts. It considered evidence applicable to all Challenged Districts, analyzed the way the Challenged Districts were drawn in light of changes made to relevant geographic areas of the Commonwealth, and heard expert and lay testimony specific to particular Challenged Districts.

Having conducted this exhaustive analysis, and applying the correct legal standard as clarified by this Court, the district court held that race was the predominant factor undergirding the Challenged Districts and that the General Assembly's use of race to draw these districts was not narrowly tailored.

The district court's factual findings, which compel its ultimate conclusion that the Challenged Districts fail constitutional scrutiny, are subject to clear error review. These findings are entirely supported in the record and most assuredly are not clearly erroneous.

It is Applicants' burden to show likelihood of success on the merits. Their ostrich-like approach to the record evidence does not come close to meeting that burden.

1. The Record Contains Overwhelming Support for the District Court's Factual Findings of Racial Predominance

Unsurprisingly, given the clear error standard of review, Applicants refuse to engage with the district court's detailed factual findings. Applicants instead spend a scant three pages addressing predominance, which consists entirely of a discussion of the fact that there was a dissent below (Mot. at 14-15), and a misleading and incomplete characterization of the district court's findings as to a single district (Mot. at 15-17). Applicants ignore the factual findings set out in the Memorandum Opinion for scores of pages (J.S. App. 16-86), which include both "direct evidence going to legislative purpose" and "circumstantial evidence" regarding district "shape and demographics" demonstrating "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller*, 515 U.S. at 916.

The Memorandum Opinion details (a) statewide evidence that the Challenged Districts were singled out and subjected to a strict racial target that was treated as the most important and nonnegotiable factor during the redistricting process; (b) regionwide evidence explaining how adherence to that racial target drove the construction of districts in the areas of the state where there are Challenged Districts and (c) district-specific evidence showing the ways that district boundaries and population were manipulated to serve the General Assembly's racial goals.

As a review of the Memorandum Opinion's stultifyingly detailed exploration of the minutia of the Challenged Districts reflects, the district court's analysis "is highly fact-specific, and involves numerous credibility findings based on [its] assessment of the testimony presented at trial." J.S. App. 14. Indeed, the district court's Memorandum Opinion was the product of 2 trials, 12 expert reports, 17 witnesses, and multiple rounds of briefing over the course of 3 years.

On appeal, all of the factual findings set out in the Memorandum Opinion and summarized below—including "as to whether racial considerations predominated in drawing district lines"—are subject to "clear error" review. *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017). And of course, gauging witness credibility is a classic prerogative of the trial court and, accordingly, "can virtually never be clear error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985); *see also Cooper*, 137 S. Ct. at 1474 (Appellate courts "give singular deference to a trial court's judgments about the credibility of witnesses . . . because the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record") (quoting *Anderson*, 470 U.S. at 575).

a. Direct Evidence

The district court detailed considerable direct evidence. The General Assembly sought to comply with the Voting Rights Act ("VRA") by using a numerical "mandatory" racial threshold unfounded in any evidence whatsoever. *Compare* Memorandum Opinion, J.S. App. 17-19, *with Cooper*, 137 S. Ct. 1455, *and Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). Specifically, the

General Assembly adopted an across-the-board 55% BVAP rule and applied it indiscriminately to District 75 and the Challenged Districts. As the Court put it previously: "It is undisputed that the boundary lines for the 12 districts at issue were drawn with a goal of ensuring that each district would have a [BVAP] of at least 55%." *Bethune-Hill*, 137 S. Ct. at 794; *see also id.* at 795 ("[T]he 55% BVAP figure was used in structuring the districts.") (quoting ECF No. 108 at 22). On remand, the district court found "as a matter of fact that the legislature employed a mandatory 55% BVAP floor in constructing all 12 challenged districts." J.S. App. 18-19.

But that was not all. The record revealed that the mapdrawer refused to consider and would not accept versions of the Challenged Districts that did not comport with the mandatory BVAP floor. *See, e.g., id.* at 43 (mapdrawer refused to consider revisions to proposed plan unless "any changes complied with the . . . 55% BVAP requirement[]"). The mapdrawer further testified as to the specific changes to district lines he made in service of that overriding racial goal. *See, e.g., id.* at 41-42 (mapdrawer "conceded that this eastward move [of District 71] into District 70 was required to ensure that District 71 had sufficient BVAP to meet the 55% number"). Incumbent delegates of the Challenged Districts confirmed that they were forced to cede areas they had long represented because of the mapdrawer's insistence on a 55% BVAP floor. *See, e.g., id.* at 39-43.

In sum, the direct evidence here is precisely "the kind[] of direct evidence [the Court has] found significant in other redistricting cases." *Cromartie II*, 532 U.S. at

254 (citing *Bush v. Vera*, 517 U.S. 952, 959 (1996) "(State conceded that one of its goals was to create a majority-minority district)"; *Miller*, 515 U.S. at 907 "(State set out to create majority-minority district)"; *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) "(recounting testimony by Cohen that creating a majority-minority district was the 'principal reason' for the 1992 version of District 12)").

b. Circumstantial Evidence

The fact the General Assembly used a one-size-fits-all mandatory racial floor manifests starkly in the plan it adopted to accomplish those racial ends. Heavily-black populations were swept into the Challenged Districts, and artfully split *between* Challenged Districts, whereas less heavily black areas were carefully excised from Challenged Districts. The district court "reach[ed] the unavoidable conclusion that the challenged districts were designed to capture black voters with precision." J.S. App. 23. The district court considered a host of expert evidence along the way, which illustrated the point through both visual representation and statistical analysis. *Id.* at 20-32. The district court then embarked on a district-by-district, region-by-region analysis to uncover a stark pattern of racial sorting between and among the Challenged Districts. *See id.* at 37-82.

In its first opinion, the district court had already detailed the various cartographical curiosities of the Challenged Districts (which it then proceeded to discount under its erroneous predominance test). *See generally* ECF No. 108. The first opinion describes a rogue's gallery of features frequently found to be strong circumstantial evidence of racial predominance, from "appendages" to "hooks" to

"turrets" to "pipes" and "ax-shaped districts."[6] In some cases, the district court could divine no "reasonably neutral explanation for" a given district's boundaries. *Id.* at 153.

As this work had already been done, in its Memorandum Opinion, the district court did exactly what this Court had instructed—take a step back from consideration of individual "deviations," look at the big picture, and conduct a holistic analysis so as not to "obscure the significance of relevant districtwide evidence, such as stark splits in the racial composition of populations moved into and out of disparate parts of the district, or the use of an express racial target." *Bethune-Hill*, 137 S. Ct. at 800. And what that evidence showed was stark and compelling. At every level—cities, towns, unincorporated places (even a military base)—with near uniformity, "areas of higher concentrations of black voting-age people were put into the [C]hallenged [D]istricts and areas of lower concentrations were put into the non-challenged districts." Tr. 392:13-20 (Palmer); *see also* Pls.' Ex. 71 ¶¶ 66-82, 144-45. Thus, while black voters were moved into the Challenged Districts at a higher rate than the population as a whole, white voters, and

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[6] *See, e.g.*, ECF No. 108 at 108-09 (HD 63's "deviations . . . begin with the splitting of Dinwiddie County" and include large increases in county, city, and VTD splits); *id.* at 125-27 (increased VTD splits in HD 69, which is not contiguous by land); *id.* at 130-31 (HD 70 includes a "turret" that "appears to deviate from districting norms"); *id.* at 132 (increased VTD splits in HD 71, which also shows "facially evident deviations"); *id.* at 137 (discussing HD 74's irregular "ax-shape[]"); *id.* at 140-42 (HD 77 is "thrust so far into HD76 as to nearly sever it in half," is not contiguous by land, and lacks a water crossing); *id.* at 144 (HD 80 "makes little rational sense as a geographical unit"); *id.* at 148-49 (examining a "pipe" on HD 89's border and other "deviations"); *id.* at 150 (noting HD 90's "two extensions into Virginia Beach and lack of land contiguity"); *id.* at 153 (HD 95 is the "least compact district on the map under the Reock metric").

Democratic voters, black voters were moved out of the Challenged Districts at a lower rate than all these groups. Pls.' Ex. 71 ¶¶ 100-04, tbls. 18-19; Tr. 395:1-7 (Palmer).

But the district court's analysis was not limited to its review of the map, data, and related expert testimony. It heard from numerous fact witnesses. And the second trial revealed something striking. The explanations proffered by the mapdrawer in the first trial for line-drawing decisions repeatedly collapsed under scrutiny in the second trial. *Compare, e.g.*, ECF No. 108 at 148 (HD 80 "added a small 'pipe' . . . , which includes a funeral home owned by" the incumbent), *with* Tr. 504:17-505:13 (Jones) (this funeral home is not in the "pipe"). As the district court summarized, "when faced at the second trial with new witnesses challenging material aspects of his previous testimony, and having had access to the transcript of his testimony at the first trial, [the chief mapdrawer] was unable to produce convincing explanations for the discrepancies." J.S. App. 37-38. And when Appellants attempted to bolster the mapdrawer's testimony with new testimony from a consultant, John Morgan, who helped draw the map, it backfired. Morgan testified that "the precision with which [voting tabulation district] splits divided white and black areas was mere happenstance." *Id.* at 33-34. For good reason, the district found that Morgan's testimony "simply is not credible." *Id.* at 34.

Confronted with compelling direct and circumstantial evidence of racial predominance, and incredible attempts to explain that evidence away, the district court appropriately concluded that race predominated in each Challenged District.

c. Applicants Cannot Show That the District Court's Findings as to Racial Predominance Are Clearly Erroneous

Against all this, Applicants say nothing. Rather, their discussion of their supposed likelihood of success on the merits is limited to District 92, as to which they mischaracterize the district court's findings.

Here, as elsewhere, Respondents provided ample "direct evidence of the legislative purpose and intent," including "the use of an express racial target" and "other compelling circumstantial evidence" such as "stark splits in the racial composition of populations moved into and out of disparate parts of the district." *Bethune-Hill*, 137 S. Ct. at 799-800.

Districts 92 and 95 are in the North Hampton Roads region, which is located on a peninsula. At the time of redistricting, both District 92 and next-door District 95 had "severe underpopulation." J.S. App. 57. The most natural way to draw District 92 to achieve population equality was to expand the district "into heavily white precincts, negatively impacting the BVAP level of District 92." *Id.* at 63. But given the constraints imposed by the 55% BVAP floor, the mapdrawer instead transferred "high BVAP" areas from District 95 to District 92, which in turn required turning District 95 into a bizarre, serpentine district that unites far-flung African-American communities. *See generally id.* at 56-64.

Thus, the district court's predominance finding in District 92 was based on an analysis of how the legislature achieved its racial goals in the way it restructured and sorted population both "within" and "without" District 92. *Miller*, 515 U.S. at 916. Applicants complain that the district court did not stop its analysis after

conducting an eyeball review of the district's surface-level adherence to traditional redistricting criteria. *See* Mot. at 15. This argument flatly disregards and misunderstands this Court's holding on the first appeal. *See Bethune-Hill*, 137 S. Ct. at 799-800 (reversing where district court gave "insufficient weight" to "other compelling circumstantial evidence" such as "stark splits in the racial composition of populations moved into and out of disparate parts of the district").

The district court's predominance finding in District 92—and elsewhere—is based on the district court's hard-won expertise in the minutia of Virginia's geography and 2011 redistricting process, and it is subject to clear error review. Applicants' cursory and incorrect discussion of the district court's findings in a single district does not establish clear error, and it does not meet Applicants' burden of demonstrating a likelihood of success on the merits.

2. Applicants Cannot Show That the District Court's Findings as to Narrow Tailoring Are Clearly Erroneous

Likewise, the district court's conclusion that the General Assembly's predominant use of race in the Challenged Districts was not narrowly tailored to a compelling government interest is similarly well supported in the record evidence.

Once a plaintiff establishes racial predominance, "the burden shifts to the State to 'demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest.'" *Bethune-Hill*, 137 S. Ct. at 800-01 (quoting *Miller*, 515 U.S. at 920). Courts "assume[] . . . that the State's interest in complying with the [VRA is] compelling." *Id.* at 801. To satisfy strict scrutiny, a State must establish "a strong basis in evidence in support of the (race-based) choice that it has made," *Alabama*,

135 S. Ct. at 1274 (internal quotation marks omitted), which "exists when the legislature has '*good reasons* to believe' it must use race in order to satisfy the [VRA], 'even if a court does not find that the actions were necessary for statutory compliance.'" *Bethune-Hill*, 137 S. Ct. at 801 (quoting *Alabama*, 135 S. Ct. at 1274).

While a State thus is given some latitude in complying with the VRA, it must conduct a "meaningful legislative inquiry" to determine whether drawing a given district "without a focus on race but however else the State would choose, could lead to [VRA] liability." *Cooper*, 137 S. Ct. at 1471. The fact that courts do not demand mathematical exactitude does not mean that legislatures may use race indiscriminately and without adequate factual support. In the context of redistricting, "[s]trict scrutiny remains . . . strict." *Bush*, 517 U.S. at 978.

Here, the district court concluded that the Commonwealth failed to meet its strict scrutiny burden. The facts supporting that conclusion are inexorable. Indeed, the key ones were already decided by this Court and are law of the case.

The legislature drew each Challenged District to comply with the same mandatory 55% BVAP floor. *See Bethune-Hill*, 137 S. Ct. at 795-96. That fixed racial target was derived "based largely on concerns pertaining to the re-election of [the incumbent] in District 75." *Id.* at 796 (brackets omitted) (quoting ECF No. 108 at 29-30). "The 55% figure 'was then applied across the board to all'" the remaining Challenged Districts. *Bethune-Hill*, 137 S. Ct. at 796 (quoting ECF No. 108 at 30).

By definition, a BVAP percentage tailored to one district based on local factors specific to that district is not tailored—narrowly or otherwise—to other

districts. Applying a single BVAP floor "across-the-board" is the antithesis of narrow tailoring.

The Court upheld District 75 in the first appeal because the mapdrawer conducted an adequate "functional analysis" as to the necessary BVAP in that district, which included reviewing the consequences of the district's prison population, talking to the incumbent and others on numerous occasions, and reviewing turnout rates and voting patterns. *Bethune-Hill*, 137 S. Ct. at 801; *see also* J.S. App. 89. By contrast, as to the remaining Challenged Districts, the district court found as a matter of fact that the mapdrawer had *not* done the same analysis before applying the 55% BVAP floor across-the-board.

Indeed, the district court found that Applicants "produced no evidence at either trial showing that the legislature engaged in an analysis of *any* kind to determine the percentage of black voters necessary to comply with Section 5 in the 11 remaining challenged districts." J.S. App. 88. By way of example, the General Assembly drew the Challenged Districts to meet the 55% BVAP floor without:

(a) comparing other districts to District 75 with regard to factors relevant to black voters' ability to elect their candidate of choice;

(b) considering whether other districts had the same characteristics that warranted use of a 55% BVAP target in District 75;

(c) considering the fact that District 75 is in fact markedly *different* from the other Challenged Districts;

(d) considering recent election results in the other Challenged Districts;

(e) conducting any analysis of racial voting patterns or determining the degree to which voting was racially polarized in Challenged Districts.

J.S. App. 88-90. In fact, had the General Assembly done the analysis it eschewed, it would have learned that "as a matter of fact . . . a 55% BVAP was *not* required in any of the 11 remaining challenged districts for black voters to elect their preferred candidates." *Id.* at 90-91 (emphasis added). This is not a counterintuitive result. For example, "District 71 was a densely populated urban area in a city of more than 200,000 residents, whereas District 75 is located in a rural region with a high population of prisoners who cannot vote." *Id.* at 90. The two districts are "not remotely similar." *Id.* (quotation marks omitted). Unsurprisingly, what was tailored to District 75 was not tailored to any other district.[7]

Simply put, the district court found that it was Applicants' burden of proving narrow tailoring and that they failed to prove that the factually-unsupported application of a single, mechanical racial target to twelve very different districts was narrowly tailored. This is not because the district court demanded that the State Defendants prove the legislature had used precisely the BVAP percentage that Section 5 demanded, as Applicants insinuate. *See* Mot. at 17. The district court expressly stated that it was imposing no such requirement. J.S. App. 95 (citing *Alabama*, 135 S. Ct. at 1273). Rather, the district court found, as a matter of fact, that the General Assembly applied the 55% "BVAP figure" to the Challenged Districts "entirely without evidentiary foundation." *Id.* That is, "the legislature did

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[7] The court-appointed special master has confirmed the district court's analysis. In a Report setting out proposed remedial plans for the district court's consideration, the Special Master noted that his "own analyses specific to the unconstitutional legislative districts demonstrate that the claim that a 55% minority voting age population is always needed in a district to assure African-American voters a realistic opportunity to elect candidates of choice is, factually, flatly wrong." ECF No. 323 at 44-45.

not undertake *any* individualized functional analysis in *any* of the 11 remaining challenged districts to provide 'good reasons to believe' that the 55% threshold was appropriate." ECF No. 234 at 91 (quoting *Alabama*, 135 S. Ct. at 1274); *see also* *Abbott v. Perez*, 138 S. Ct. 2305, 2335 (2018) (use of race was not narrowly tailored because the State "pointed to no actual 'legislative inquiry' that would establish the need for its manipulation of the racial makeup of the district" and failed to make "a strong showing of a pre-enactment analysis with justifiable conclusions").

Because the General Assembly did no analysis whatsoever to support its decision to apply a single mechanical racial target to eleven very different Challenged Districts, Applicants have little to say. Applicants half-heartedly argue that the General Assembly had a strong basis in evidence, but are of course unable to explicate any such supposed evidence. *See* Mot. at 16-18. Their main thrust is instead that their strict scrutiny burden is not very burdensome—that the Commonwealth can segregate its citizens into districts based on their race when faced with (self-imposed) "significant time constraints" or if it has "limited data" about whether its use of race is warranted. *Id.* at 17.

A "strong basis in evidence" is hardly established by "no evidence," and states cannot pass legislation for predominantly racial reasons merely because of the press of time. Simply put, accepting Applicants' apparent argument that Section 5 of the VRA created a safe harbor under which states could draw 55% BVAP districts with impunity and without supporting evidence would turn the VRA on its head,

transforming it into what amounts to a tool for perpetuating electoral racial segregation. The words of the Court in *Miller* apply with full force here:

> The [VRA], and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. . . . The end is neither assured nor well served, however, by carving electorates into racial blocs. . . . It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.

Miller, 515 U.S. at 927-28.

D. The Other Factors Also Militate Against a Stay

1. Applicants Cannot Dispute that Respondents and Tens of Thousands of Other Residents of the Challenged Districts Will Suffer Irreparable Injury if a Stay Is Granted

Even if Applicants could establish a likelihood of success on the merits, which they cannot, a stay is inappropriate because the other relevant factors also counsel strongly against granting the stay.

There is no doubt that granting the requested stay would cause irreparable injury to Respondents and the public. All three members of the panel below, including Judge Payne (who disagreed on the merits), recognized as much. *See* ECF No. 256 at 2; *id.* at 3 ("I fully agree with the irreparable injury analysis made by the majority, and, on balance, the injury to the plaintiffs if a stay is granted significantly outweighs the injury to the Defendant-Intervenors if the stay is denied.") (Payne, J., concurring); *see also* ECF No. 322 (unanimously denying Applicants' renewed stay motion).

Indeed, the right to vote is one of the most fundamental rights in our democratic system of government and is afforded special protection. *See Reynolds*, 377 U.S. at 554-55; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). Accordingly, any illegal impediment to the right to vote is an irreparable injury. *See Elrod*, 427 U.S. at 373.

A district constructed for unjustified and predominately racial reasons "bears an uncomfortable resemblance to political apartheid" and amounts to use of "racial stereotypes." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Residing in such districts is a palpable and ongoing injury to Respondents and every voter who resides in the Challenged Districts. It is one they have suffered for seven years, during which time they have been forced to vote in four elections under an unconstitutional plan.

Moreover, the public interest also weighs heavily in favor of denying Intervenors' motion. Where a court finds that a legislature has impermissibly used race to draw legislative districts, "the public interest aligns with the Plaintiffs' . . . interests, and thus militates against staying implementation of a remedy." *Personhuballah*, 155 F. Supp. 3d at 560. "[T]he harms to the Plaintiffs would be harms to every voter in" the Challenged Districts who are being denied their constitutional rights. *Id.*; *see also Harris*, 2016 WL 6920368, at *2 ("[T]he harms to North Carolina in this case are public harms. The public has an interest in having . . . representatives elected in accordance with the Constitution.").

Indeed, the injury is particularly acute here. The 2019 election is the last regularly scheduled election before the next decennial redistricting. While Applicants assure the Court in no uncertain terms that the Commonwealth can and will implement a remedial plan for use in the 2019 elections if this Court affirms, Mot. at 3, they have previously argued that a stay should be granted because it is supposedly "too late" to implement a remedial plan before 2019. *See* ECF No. 237 at 8 (arguing that "compelling the House to redraw the map to have one in place before next year's elections" would constitute irreparable injury to Applicants).[8]

As this Court has noted, "once a districting scheme has been found unconstitutional, 'it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.'" *Harris*, 2016 WL 6920368, at *2 (quoting *Reynolds*, 377 U.S. at 585).

This factor strongly militates against granting a stay.

2. Applicants Will Not Suffer Any Injury—Let Alone Irreparable Injury—in the Absence of a Stay

Even if Applicants could establish a likelihood of success on the merits, which they cannot, a stay is inappropriate because Applicants will not suffer any injury in

[8] Applicants dropped this argument after Respondents noted that since 2019 is the last regularly scheduled election before the next decennial redistricting, Applicants were effectively asking for an ultimate victory through the guise of a stay. The fact that Applicants have previously argued against implementing a remedy for the 2019 elections, however, gives reason to be concerned that they would change their position again if the stay is granted and the Court thereafter affirms.

the absence of a stay, for the reasons outlined above with regard to standing and summarized here. *See supra* III.B.

As an initial matter, the Court should view Applicants' assertions of injury with considerable skepticism given that Applicants filed the instant stay application three months after the district court denied their first stay motion below. *See, e.g., Chem. Weapons Working Grp. (CWWG) v. Dep't of the Army*, 101 F.3d 1360, 1361-62 (10th Cir. 1996) (denying motion for stay pending appeal because appellants waited several weeks before seeking the stay and that delay belied their claim of "extreme urgency"); *Hirschfeld v. Bd. of Elections in City of N.Y.*, 984 F.2d 35, 39-40 (2d Cir. 1993) (denying motion for stay pending appeal because appellant waited five weeks after district court decision before seeking stay and thus appellant's "inexcusable delay . . . severely undermine[d] [its] argument that absent a stay irreparable harm would result").

Second, Applicants premise their application not on their own alleged injury but rather on their speculative musings about potential administrative burdens on the Commonwealth and potential voter confusion if the Court eventually reverses. But Applicants' arguments about the potential "injury" *others* will suffer if a stay is granted do not establish that *they* will suffer injury. Moreover, the State Defendants have opposed Applicants' efforts to obtain a stay.

Applicants' sleight of hand effort to stand in the shoes of the Commonwealth for purposes of arguing irreparable injury makes sense. As explained above, Applicants do not even have standing. Even under their own analysis, the only

harm that Applicants would suffer in the absence of a stay is the need to "prepare for next November's elections under a remedial plan." Mot. at 14. Even if this amorphous "harm" is a cognizable injury at all, it pales in comparison to the injury that Respondents and thousands of other Virginians will suffer if they are forced to continue to reside in racially gerrymandered districts. *See Buchanan v. Evans*, 439 U.S. 1360, 1361 (1978) (in considering a stay, the court "should 'balance the equities'" to "determine on which side the risk of irreparable injury weighs most heavily") (citation omitted).

IV. CONCLUSION

For the reasons stated above, the Court should deny Applicants' application for a stay pending appeal.

RESPECTFULLY SUBMITTED, this 20th day of December, 2018

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